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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-617

GOLAY & CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

GOLAY & CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Golay & Co., Inc. (hereinafter referred to as the "Company") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter referred to as the "Seventh Circuit") ordering the Company to pay backpay as assessed by the National Labor Relations Board (hereinafter referred to as the "Board").

OPINIONS BELOW.

The opinion of the Seventh Circuit (printed in Appendix A hereto, pp. 1a to 8a) is not reported yet. The Seventh Circuit's original judgment (printed in Appendix B hereto, pp. 9a to 10a), order denying rehearing (printed in Appendix C hereto, p. 11a), and Amended Judgment (printed in Appendix D hereto, pp. 12a to 13a) are unreported. The decision and order of the Board are reported at 184 N.L.R.B. No. 84.

JURISDICTION.

The opinion of the Seventh Circuit was issued under date of July 28, 1971. The original judgment was entered on August 26, 1971. The Company's timely petition for rehearing and rehearing en banc was denied September 30, 1971. The Seventh Circuit entered its amended judgment on October 13, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), 62 Stat. 928 (1948).

QUESTION PRESENTED.

May the Board discriminate arbitrarily in its application of remedies for unfair labor practices?

FEDERAL STATUTES INVOLVED.

The statute involved is the National Labor Relations Act, as amended, 29 U.S.C. Sections 141-168 (hereinafter referred to as the "Act").

STATEMENT OF THE CASE.

Basis of Federal Jurisdiction. The jurisdiction of the Seventh Circuit was invoked pursuant to 29 U.S.C. Sections 160 (e) and (f) on cross petitions for enforcement and review of an order of the Board issued pursuant to the Act.

Summary of Facts. In November, 1962, the Company was subjected to an in-plant strike followed the next day by belly-to-back mass picketing. The Company terminated or refused to reinstate 42 of the strikers who engaged in this misconduct.

In the original proceeding, the Trial Examiner found that 23 of the 42 employees discharged were not entitled to reinstatement or backpay.

The Board itself kept the case under advisement for two (2) years and four (4) months before it finally issued its decision. In its decision the Board reversed the Trial Examiner and found that all of the discharges violated Section 8(a)(3) of the Act. It ordered reinstatement with backpay for all of the claimants.

The Seventh Circuit, in the original proceeding, expressly refused to adopt the Board's finding that the 23 discharges upheld by the Trial Examiner violated Section 8(a)(3). The Seventh Circuit did affirm the order of reinstatement with backpay for all the claimants, but it did so by applying the *Thayer* balancing doctrine, *N.L.R.B.* v. *H. N. Thayer Co.*, 213 F. 2d 748 (1st Cir. 1954). *Golay & Co., Inc.* v. *N.L.R.B.*, 371 F. 2d 259, 262-63 (7th Cir. 1966).

In the present supplementary proceeding both the Trial Examiner and the Board continued to treat all claimants as discriminatees whose discharges violated Section 8(a)(3) of the Act and refused to toll backpay during the period prior to the reversal of the favorable Trial Examiner's decision. The Seventh Circuit affirmed the Board's supplemental order without modification.

REASONS FOR GRANTING THE WRIT.

At the insistence of the Court of Appeals for the District of Columbia, *Burinskas* v. *N.L.R.B.*, 357 F. 2d 822 (D.C. Cir. 1966), the board clarified its rules on the tolling of backpay in *Ferrell-Hicks Chevrolet, Inc.*, 160 N.L.R.B. 1692 (1966). In that case the Board explained that in 8(a)(3) situations it had not tolled backpay prior to the reversal of a favorable decision because once unlawful intent was found—even by a reviewing authority—its existence became an indisputable fact of which the employer must have been aware from the beginning. Therefore the employer had no fair reason to rely on an erroneous intermediate decision.

At the same time, in *Ferrell-Hicks* the Board recognized that this reasoning has no application in cases not involving unlawful intent.

When there is no finding of unlawful intent the employer cannot be held to have known from the beginning that his conduct was unlawful. Therefore, the Board said, in such cases it would consider any factors which might suggest that a full backpay award would be inappropriate.

In such cases, the Board said, it would be "more receptive" to employer contentions that:

> ". . . it was justifiably reliant on a decisional error or on the expectation that the Board would adhere to a particular view of the law." *Id.* at 1697.

As a specific example it cited *Kohler Co.*, 148 N.L.R.B. 1434 (1964), in which backpay was tolled for claimants discharged for misconduct even though they were ordered reinstated with backpay on the basis of the *Thayer* doctrine.

Backpay for other claimants in *Kohler* whose discharges violated Section 8(a)(3) was not tolled. In analyzing the tolling of back pay in *Kohler* the Board relied on the fact that

> ". . . the decision to reinstate [did not] arise out of a finding that the employees had been discharged because of a deliberate employer intent to obstruct their collective activities." *Ferrell-Hicks Chevrolet, Inc.*, 160 N.L.R.B. at 1696.

For tolling purposes the present case is indistinguishable from *Kohler*.

In fact, in this case the Company, if anything, has greater equity than *Kohler*, for the Trial Examiner in this case applied *Thayer* and determined that even on balance the dischargees were *not* entitled to reinstatement. The Company clearly had even greater reason to rely on the Trial Examiner's decision in this case than did the Company in *Kohler*, where there was no divergence of opinion at any stage of the proceedings as to the result dictated by the *Thayer* doctrine.

In addition, in the present case the Company was certainly "justifiably reliant on a decisional error". In upholding the discharges, the Trial Examiner followed well-established precedent going back as far as 1938. At the time of his decision there had never been a case decided by the Board or any court in the United States holding that an employer may not discharge employees who occupy the production area of a plant with the intention of remaining there without working until such time as the employer acceded to their demands. Even now, in *Cone Mills Corp.* v. *N.L.R.B.*, 413 F. 2d 445 (4th Cir. 1969) the General Counsel itself argued that the correct procedure for an employer in a situation like that in *Golay* is precisely the procedure followed by *Golay*!

The Board in this case has arbitrarily and without justification refused to follow its own rules. It has treated identical situations in dissimilar ways in clear breach of its well-recognized duty to administer the Act fairly and impose like remedies in similar situations. See, *e.g. Burinskas* v. *N.L.R.B.*, 357 F. 2d at 827; *N.L.R.B.* v. *General Stencils, Inc.*, 438 F. 2d 894 (2d Cir. 1971). The Board's discrimination in remedy in this vitally important area is a question of great importance and should be settled by this Court.

Respectfully submitted,

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APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 18666 SEPTEMBER TERM, 1970 APRIL SESSION, 1971

GOLAY & CO., INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

JULY 28, 1971

Before HASTINGS, *Senior Circuit Judge,* and KILEY and FAIRCHILD, *Circuit Judges.*

KILEY, *Circuit Judge.* This is the second time this proceeding has been before the court. In Nos. 15540 and 15656, *Golay & Co.* v. *NLRB,* 371 F. 2d 259 (7th Cir. 1966), *cert. denied,* 387 U.S. 944, we enforced the Board's order with respect to Section 8(a)(3) and (1) violations of the National Labor Relations Act, 29 U.S.C. § 151, et seq., by respondent (Company) covering 19 of 42 employees. We did not adopt the Board's opinion or enforce its order with respect to 23 other employees whom the Board found, contrary to the Examiner's finding, were also discharged in violation of 8(a)(3) and (1), but we did approve the reinstatement of these employees under *NLRB* v. *Thayer Co.,* 213 F. 2d 748 (1st Cir. 1954), *cert. denied,* 348 U.S. 883. We enforced the order as modified and remanded for further proceedings. The Supplemental Decision and

Order now before us followed, awarding to the reinstated employees $158,700.74 back pay. The Company has petitioned for review and the Board has cross-petitioned for enforcement. The Supplemental Decision and Order will be enforced.

During the lunch period on November 19, 1962, a group of employees agreed to, and did, punch in and refuse to work until a fellow employee Paris, unlawfully discharged that morning, was reinstated. Thereafter, 34 employees were discharged by the Company for refusing to work. The next morning, November 20, a picket line formed. As a result of alleged "misconduct" involving the picket line, the Company refused to rehire 8 other strikers when they offered to return to work. The unfair labor practice complaint followed.

The Trial Examiner's original decision was that 19 of the 34 discharges on November 19 violated Sections 8(a)(3) and (1) since the protest strike was protected activity, but that the remaining 15 were lawfully discharged for in-plant misconduct prior to their discharge that afternoon. He also found that 11 of the 19 unlawfully discharged employees were guilty of post-discharge misconduct on the same day and that these 11 were not entitled to reinstatement. The Trial Examiner further found that 8 other employees who were discharged for picketing on the morning of November 20 were entitled to reinstatement, since either they were not involved in any misconduct on the picket line or their misconduct was condoned.

The Board, however, found that all 42 employees were either wrongfully discharged or refused reinstatement in violation of 8(a)(3) and (1) and were entitled to back pay. The Board alternatively concluded that, assuming the strikers' conduct to be unprotected, it "was not of such serious nature in the total circumstances of this case to warrant denial of their reinstatement" when measured against the Company's "massive unfair labor practices." Our earlier opinion followed. We decided that 19 employees did not participate in the in-plant misconduct November 19 until after they were discharged and that this fact justifies the Board order finding an 8(a)(3) and (1) violation. As to the remaining 23 employees,

we applied the balancing rule of *NLRB* v. *Thayer Co.*, 213 F. 2d 748 (1st Cir. 1954), *cert. denied*, 348 U.S. 883,[1] and found in agreement with the Board that their misconduct, measured against the "massive" Company unfair labor practices, was no bar to reinstatement. Our enforcement of the order as "modified" and the Supplemental Order now before us followed.

I.

The main issue presented to us is whether back pay should have been tolled from the time of the Trial Examiner's decision to the Board's decision for the 23 employees[2] whom the Examiner had found were not entitled to reinstatement and whose discharge was not found unlawful by this court.

The Company relies for its argument that back pay should have been tolled upon the Board's supplemental decision and order in *Kohler Co.*, 148 N.L.R.B. 1434 (1964), *enf'd* 345 F. 2d 748 (D.C. Cir. 1965), and *Ferrell-Hicks Chevrolet, Inc.*, 160 N.L.R.B. 1692 (1966). The Company does not now challenge the reinstatement of the 42 employees. They have long since been reinstated. It challenges only the failure of the Board on remand to apply the tolling principle in awarding back pay.

We deem it necessary to discuss only the decision in *Ferrell-Hicks* in rejecting the challenge. There the Company claimed error in the Board's failure to toll employee Burinskas' back pay between the Board's decision favoring the Company and the court of appeals' (*sub nom Burinskas* v. *NLRB*, 357 F. 2d 822 (D.C. Cir. 1966)) eventual

[1] "Thayer holds that where an employer who has committed unfair labor practices discharges employees for unprotected acts of misconduct, the Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employees' misconduct in determining whether reinstatement would effectuate the policies of the Act." Local 833, UAW AFL-CIO v. NLRB, 300 F. 2d 699, 702-03 (D.C. Cir. 1962), cert. denied, 370 U.S. 911.

[2] The Company argues that the back pay of the 23 employees whose reinstatement we ordered—without considering whether their discharge (or failure to be rehired) was an 8(a)(3) and (1) violation—should be tolled from the time of the favorable decision by the Trial Examiner and the overruling of that decision by the Board. However, the Examiner ordered the reinstatement of the 8 employees who were not rehired because of their November 20 conduct, and therefore there was no decision favorable to the Company with respect to these employees.

enforcement of the Board's supplemental decision adverse to the Company. The court of appeals in enforcing the Board's supplemental decision discussed at length the Board's varying practices and the lack of clarity in its decisions with respect to the tolling question: Before *A.P.W. Products Co., Inc.*, 137 N.L.R.B. 25 (1962), *enf'd*, 316 F. 2d 899 (2nd Cir. 1963) back pay was tolled for the period from the issuance of the Examiner's decision favorable to the Company to the Board's decision reversing that determination; not tolled at all thereafter until *Walls Mfg. Co., Inc.*, 137 N.L.R.B. 1317 (1962), *enf'd*, 321 F. 2d 753 (D.C. Cir. 1963); and finally tolled only in "unique" or "unusual" cases under *Kohler Co., supra*. The court remanded to the Board for development of "at least minimal" standards for the Board's exercise of discretion.[3]

The standards the Board set on remand are: (1) In 8(a) (3) cases, after determination of fact by the final reviewing authority that an employer has discharged an employee with the unlawful intent of discouraging union activities, there are no equitable considerations available to the employer "wrongdoer"—even if he has relied on an earlier favorable decision to refuse reinstatement—to justify withholding the discriminatee's pay and there is no tolling of back pay. (2) In cases of other unlawful labor practices of an employer, where there is no unlawful intent which "so compellingly fixes the equity" in favor of the discriminatee as in 8(a) (3) cases, the Board will consider "any special factors" which render full back pay inappropriate to effectuate the policies of the act. *Ferrell-Hicks Chevrolet, Inc., supra* at 1694 ff.

The fact that in our earlier decision we did not expressly adopt the Board's order that the discharges of the 23 employees were Section 8(a) (3) and (1) violations does not per se compel tolling their back pay under the *Ferrell-Hicks* guidelines. The misconduct for which they were discharged and denied reinstatement was "triggered" by "massive" unfair labor practices. Even if their discharges were without an unlawful intent, the Board has, under Section 10(c) of the Act, "broad discretion" in fashioning the

[3] The Board was also directed to determine whether Burinskas' back pay should be tolled. Upon remand the Board did not toll Burinskas' back pay because it had been "ultimately found" that Ferrell-Hicks had unlawfully discharged him and had discouraged union activity among its employees.

remedy for an employer's unfair labor practices, *NLRB* v. *Thayer Co., supra* at 753; see *Fibreboard Corp.* v. *NLRB,* 379 U.S. 203, 215-16 (1964), and no "special factors" are urged by the Company as to why it would be inequitable to burden it with the financial consequences of its unlawful practices in order to restore the status quo ante, see *NLRB* v. *Rutter-Rex Mfg. Co.,* 396 U.S. 258 (1969).

In *Kohler* the Board initially denied reinstatement of the strikers because of unprotected acts of misconduct on their part and because there was no unlawful intent on the part of the employer. The court of appeals set aside the Board's denial of reinstatement because of its failure to apply the *Thayer* doctrine. On remand the Board reinstated all of the strikers, but decided in its discretion, under the special circumstances of the case, Kohler should not be burdened with the back pay liability for the period before the court of appeals decision. The special factor in *Kohler* was that the employer was not fully advised of the law concerning his refusal to reinstate the strikers until the court of appeals decision, since the Board had not accepted the *Thayer* principle as applicable to the case. Under its discretionary power the Board justified tolling the Kohler strikers' back pay.

But the Company here has not shown that it could reasonably have expected the Board would approve the Examiner's findings and conclusions as to the 23 by "adhering to a particular view of the law," since the Examiner, Board and the court applied *Thayer* throughout this proceeding. And the equities between the Company and the employees did not "draw close . . . to equilibrium"[4] since the employees' misconduct was triggered by the employer's "massive" unfair labor practices.

II.

There is no merit in the Company's contention that the Board erroneously used the "quarterly computation method"[5] in determining net back pay due to the 42 employees.

[4] Ferrell-Hicks Chevrolet, Inc., 160 N.L.R.B. 1692, 1698 (1966).

[5] The quarterly periods begin the first day of January, April, July and August. The net loss of pay is determined for each quarter or portion thereof and the earnings for one quarter are to have no effect on the liability for any other quarter. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 345 (1953).

The quarterly computation method was established in *F. W. Woolworth,* 90 N.L.R.B. 289 (1950), for that case and future cases and was approved by the Supreme Court in *NLRB* v. *Seven-Up Bottling Co.,* 344 U.S. 344 (1953); it is the "usual formula" for the computation of net back pay. *NLRB* v. *Rutter-Rex Mfg. Co.,* 396 U.S. 258, 261 (1969). Use of the formula in this case is not "oppressive" nor "not calculated to affect the policy of the Act." *NLRB* v. *Seven-Up, supra* at 349.[6] The Company has shown no special circumstances, such as operation of a business where earnings fluctuate according to season, to justify a different method of computation.

During the back pay period the Company gave three wage increases[7] to employees in the 500 Department where the 42 employees before us had worked. The Company argues—but has not persuaded us—that the awards erroneously included these increases.

Evidence was introduced as to the general requirements for receipt of the pay increase, but no evidence was introduced as to which of the 42 employees who were discharged would have received the increase had they been working at the time. The Board held that the General Counsel having included the wage increase in the back pay allegation, the Company was obligated to plead with specificity, and prove, that the individual claimants would not have merited the increase. Since no evidence was introduced on this point, the Board held for the General Counsel and ordered that the wage increases be included in the back pay award.

We think the Board properly decided—contrary to the ruling of the Examiner—that the General Counsel did not have the burden of proof to establish these facts mitigating the employer's liability. *See Marlene Industries*

[6] The mere fact of the two and a half year delay between the Examiner's decision and that of the Board does not per se justify blaming the delay on the Board. This court has, absent a showing otherwise, placed the blame on the "unfortunate but inevitable" delay in the procedures under the Act. NLRB v. Kostel Corp., 440 F. 2d 347, 353 (7th Cir. 1971). See also New Alaska Development Corp. v. NLRB, 441 F. 2d 491 (7th Cir. 1971).

[7] One increase was given to 80 of 100 employees, the second to 51 of 146 employees, and the third to 62 of 105 employees, all without limitation to classification or grade.

Corp. v. *NLRB,* 440 F. 2d 673, 674 (6th Cir. 1971). The information upon which qualifications for the raises were made was peculiarly in the possession of the Company, and the Company was responsible for the 42 employees losing the opportunity to qualify for the increase. *See NLRB* v. *Miami Coca-Cola Bottling Co.,* 360 F. 2d 569, 572-73 (5th Cir. 1966).

The Board decided—contrary to the Examiner—that employees Frady, Harrison and Jamieson made reasonably diligent searches for employment in the back pay period. We are not persuaded that this decision was erroneous. The test is not whether an employee worked in the period or what he earned, per se, but whether in mitigation of his loss of earnings he made an "honest good faith effort." *NLRB* v. *Cashman Auto Co.,* 223 F. 2d 832, 836 (1st Cir. 1955).

The record furnishes a substantial basis for the Board's conclusions that each of the three made a reasonably diligent effort to obtain employment on his own, and by registration at Indiana State Employment Security Division. Frady was told that the agency could not refer him because the Company discharged him for misconduct. Jamieson and Harrison also registered, without success. We think the Board could find that the employees' discharges for misconduct were substantial barriers to their success in mitigating their loss of pay. Furthermore, these employees, each of whom was in his fifties when the Trial Examiner made his decision and lacked a high school education, applied for jobs at various businesses in the area. Two of them—Frady and Jamieson—eventually obtained full-time employment, and the third, Harrison, held various part-time jobs throughout the period. We see no abuse of discretion in finding that they were reasonably diligent in seeking employment in the back pay period. See *Marlene Industries Corp.* v. *NLRB, supra* at 674 (6th Cir. 1971).

We also think the Board's treatment of employee Tyree is justified by the record. Before his discharge Tyree worked evenings as part-time employee of an oil company for a seven-week period. In the back pay period he became a full-time oil company employee, left that oil com-

pany for another as a full-time employee, returned to work full-time for the first company, left again to operate a gas station under a franchise, later formed a partnership in a service station—a venture which failed—and resumed operation of a service station until reinstated under the Board's order. The Board excluded from earnings, in determining his net back pay award, one-fourth of his full-time employment with the first oil company, as a continuation of his pre-discharge part-time employment. We think that the Board's determination was not unreasonable under the circumstances.

Finally, the Board could properly decline to deduct from back pay benefits employees received from their union in the relevant period, since the employees furnished no services, such as picketing, in exchange for the union payments. *Florence Printing Co.* v. *NLRB*, 376 F. 2d 216, 219-20 (4th Cir. 1967), *cert. denied*, 389 U.S. 840; *NLRB* v. *Rice Lake Creamery Co.*, 365 F. 2d 888, 893 (D.C. Cir. 1966), *cert. denied*, 371 U.S. 827.

The Supplemental Decision and Order will be ENFORCED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

GOLAY & CO., INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 18,666

JUDGMENT
(Filed August 26, 1971)

Before: HASTINGS, *Senior Circuit Judge*, and KILEY and FAIRCHILD, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of Golay & Co., Inc., to review and set aside a certain supplemental order of the National Labor Relations Board issued against petitioner on June 30, 1970, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on April 21, 1971, and has considered the briefs and transcript filed in this cause. On July 28, 1971, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's supplemental order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Golay & Co., Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

A True Copy:
Teste:
/s/ Kenneth J. Carrick
Clerk of the United States Court of
Appeals for the Seventh Circuit
By /s/ H. K. McCormack
Deputy Clerk

/s/ Roger J. Kiley
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ John S. Hastings
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ Thomas E. Fairchild
Judge, United States Court of
Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Seventh Circuit
Chicago, Illinois 60604

Thursday, Sept. 30, 1971.

Before

Hon. JOHN S. HASTINGS, *Senior Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

GOLAY & CO., INC., *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Petition for Review of an Order of the National Labor Relations Board.

No. 18666

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above entitled cause be and the same is hereby denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

GOLAY & CO., INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 18,666

AMENDED JUDGMENT
(Filed October 13, 1971)

Before: HASTINGS, *Senior Circuit Judge*, and KILEY and FAIRCHILD, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of Golay & Co., Inc., to review and set aside a certain supplemental order of the National Labor Relations Board issued against petitioner on June 30, 1970, as corrected July 10, 1970, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard the argument of respective counsel on April 21, 1971, and has considered the briefs and transcript filed in this cause. On July 28, 1971, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's supplemental order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Golay & Co., Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

/s/ Roger J. Kiley
Judge, United States Court of Appeals for the Seventh Circuit

/s/ John S. Hastings
Judge, United States Court of Appeals for the Seventh Circuit

/s/ Thomas E. Fairchild
Judge, United States Court of Appeals for the Seventh Circuit

Teste:
A True Copy:
/s/ Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-617

GOLAY & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. In its initial unfair labor practice proceeding, the Board found that the Company committed various unfair labor practices, including discharging or refusing reinstatement to 42 employees who had engaged in a strike protesting the Company's conduct in opposing the organizational campaign of the United Automobile Workers at its plant during the latter part of 1962. The Board rejected the Company's defense that the striking employees had engaged in misconduct justifying the Company's refusal to rein-

state them.[1] The Board concluded, *inter alia*, that, assuming that the strikers' misconduct removed their strike activity from the protection of Section 7 of the Act, the misconduct "was not of such serious nature in the total circumstances of this case as to warrant denial of their reinstatement" when measured against the Company's "massive unfair labor practices." 156 NLRB at 1263, n. 13.[2] The Board ordered the Company, *inter alia*, to reinstate the strikers with backpay from the date of their unconditional offer to return to work. *Id.*, at 1265. The court of appeals enforced the Board's order in full. 371 F. 2d 259 (C.A. 7), certiorari denied, 387 U.S. 944.

2. In the subsequent proceeding to determine the amount of backpay due, the Company contended that backpay for the 23 strikers found not entitled to reinstatement by the Trial Examiner (n. 1, *supra*) should be tolled for the period between the decision of the Examiner and that of the Board reversing him (R. 4).[3] The Board rejected this contention (R. 4,

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[1] The Board thus reversed its Trial Examiner who had found that 23 strikers were not entitled to reinstatement because of strike misconduct. 156 NLRB at 1260-1261.

[2] The Board applied the principle, announced in *National Labor Relations Board* v. *Thayer Co.*, 213 F. 2d 748 (C.A. 1), certiorari denied, 348 U.S. 883, that, when a strike is caused by the employer's unfair labor practices, the fact that employees have engaged in misconduct during the strike does not automatically disqualify them from reinstatement and backpay; the Board, after balancing the employer's unfair labor practices against the employees' misconduct, still may properly conclude that a remedy for the employees would effectuate the policies of the Act.

[3] "R." references are to the appendix in the court below.

63) and the court of appeals affirmed, pointing out that the Board has " 'broad discretion' " in fashioning remedies and the Company raised "no 'special factors' * * * as to why it would be inequitable to burden it with the financial consequences of its unlawful practices in order to restore the status *quo ante*, see *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969)" (Pet. App. 4a-5a).

3. The only issue the petition raises is whether the Board abused its discretion to devise appropriate remedies by declining to toll backpay for the 23 strikers here. This issue, which turns on the facts of the particular case, does not warrant review by this Court. In any event, the Board was reasonable in declining to toll here.

In *Ferrell-Hicks Chevrolet, Inc.*, 160 NLRB 1692, the Board established the policy that backpay would not be tolled even where a party relied on an earlier favorable decision in refusing reinstatement. It added, however, that, where "there is no element of employer intent which so compellingly fixes the equities * * *, the Board will consider any special factors in the case which may prompt the conclusion that a full backpay award would be inappropriate." *Id.*, at 1695. In this case the Board found, and the court of appeals agreed (Pet. App. 4a-5a), that, while there was no element of employer intent, there were also no "special factors" which would militate against a full backpay award.

The decision here does not conflict with *Kohler Co.*, 148 NLRB 1434, where backpay was tolled. In *Kohler*, the Board initially did not accept the applicability

of *Thayer* (n. 2, *supra*); therefore, until the court of appeals' remand, the employer was not "fully apprised of the legal principles to be applied to its refusal to reinstate the strikers who had been discharged for misconduct." *Ferrell-Hicks*, *supra*, 160 NLRB at 1697. There is no similar equitable consideration here, "since the Examiner, Board and the court applied *Thayer* throughout this proceeding" (Pet. App. 5a).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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